82-1290

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ALEXANDER L. STEVAS,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

ROTH'S I.G.A. FOODLINER, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL NO. 143-A,

Intervenor.

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Introduction

United Food & Commercial Workers, Local Union No. 143-A, was the Charging Party in this case before the National Labor Relations Board and the Union also was the Petitioner in the representation proceeding that preceded the Charge case. United Food & Commercial Workers, Local 143-A, (hereafter "Intervenor") intervened in the enforcement proceeding brought by the Board in the Ninth Circuit Court of Appeals and Intervenor opposes the Petition for a Writ of Certiorari filed with this Court.

In the representation case, the Board found that a unit of meat department employees at the Petitioner's Canby, Oregon store was an appropriate unit. The Canby store had previously been owned and operated by other firms and the Intervenor had been the bargaining represent-

ative for the meat department employees at that store. Petitioner operates other stores in Oregon but not within the Intervenor's territorial jurisdiction and the meat department employees in these other stores located in other Oregon cities have been represented by United Food & Commercial Workers, Local No. 1011. At the representation hearing, Local 1011 expressly disclaimed representation of the meat department employees at the Canby store.

After considering all of the facts with respect to the Petitioner's operations and the particular facts concerning the Canby store, the Board concluded that the presumption that a single store unit was appropriate had not been rebutted by evidence offered by the Petitioner. A panel of three (3) Judges on the Ninth Circuit Court of

Appeals found that the case was appropriate for submission without oral argument and in its memorandum opinion, the Court observed:

> "The record shows that the meat department employees at the new store had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the pre-existing union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry." (Citations)

Argument

It is elementary, of course, that Section 9(b) of the National Labor Relations Act (29 U.S.C. §159(b) confers broad discretion on the Board with

respect to the matter of determining what units are appropriate and that the Board's determinations invoke "of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Co. v. NLRB, 33 U.S. 485, 491 (1947).

An examination of the Board's decision in the representation case shows that the Board did consider the usual factors in determining whether the presumption that a single store unit is appropriate had been rebutted. Unit determination questions necessarily involve consideration of the particular facts in each case. Pertinent facts in connection with the determination vary, of course, from case to case. Here, Petitioner asserts that the Courts of Appeal for the First, Fourth, Sixth and

Seventh Circuits have issued decisions that are contrary to the decision of the Ninth Circuit in the instant case and that a split of authority among the Circuits exists as a result. Petitioner's contention is inaccurate because the facts of the present case are not "indistinguishable" from the facts of the cases cited from the other four Circuits.

Petitioner claims that the decision in NLRB v. Chicago Health and Tennis Clubs, 567 F.2d 331 (7th Cir. 1977), is contrary to the decision of the Ninth Circuit in the instant case. Petitioner's claim is not supported by an examination of the decision. The decision actually involves two cases. The first case concerned a corporation engaged in the retail sale of paint, wallpaper and home decorating supplies through 21 stores in the Chicago metro-

politan area. In this case, the Court did refuse to enforce the Board's Order noting that the Employer's business was both centralized and integrated, that the individual stores lacked meaningful identity as self-contained units, and that there were substantial numbers of employee transfers, both temporary and permanent, among the metropolitan area stores. In the instant case, we do not have a group of stores all within the metropolitan area of one city. We have one store located in Canby, Oregon within the Intervenor's jurisdiction and eight other stores situated in other Oregon cities. In addition, as the Board observed in the present case, the interchange of employees between the Canby location and the Petitioner's other stores was insignificant.

The other case reported with the

Saxon Paint case involved Chicago Health Clubs and in that case, the Court concluded that the Board's determination that a single store unit was appropriate was reasonable and the Court enforced the Board's Order.

Petitioner cites NLRB v. Purity Food Stores, 376 F.2d 497 (1st Cir. 1967). While this case does involve retail food stores, there are factual differences from the instant case. The Court observed that "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation." The present case does not involve similar facts or findings. In addition, the present case presents the matter of the bargaining representative for Petitioner's other stores (Local 1011) having disclaimed representation of employees at

the Canby store.

Petitioner also cites Universal Security Instruments v. NLRB, 649 F.2d 247 (4th Cir. 1981). The facts of the cited case are not at all close to those of the case at bar. The cited case involves a manufacturing operation and the Court held simply that the Board did not abuse its discretion in finding that a new plant within the metropolitan area of Baltimore, Maryland constituted an "accretion" to the unit composed of employees at two existing plants.

Petitioner cites NLRB v. Pinkertons, 428 F.2d 479 (6th Cir. 1970). The cited case, of course, involves guards. It appeared that the Columbus district office exercises close supervision over all guards in that district, and consequently the Court refused to enforce the Board's Order which had been

based upon a determination that 31 guards in the Mansfield area within the Columbus district constituted an appropriate unit. Factual differences in the Pinkertons case and the instant case are obvious.

Petitioner also cites Wayne Oakland Bank v. NLRB, 462 F.2d 666 (6th Cir. 1972). In the cited case, the Board had found that employees at one branch bank constituted an appropriate unit. The branch banks all were within 25 miles of the main office and the Court concluded that the record revealed a banking operation which was a highly centralized and fully integrated system. The Court therefore concluded that the Board's determination that employees at one branch constituted an appropriate bargaining unit amounted to an abuse of discretion.

Conclusion

In conclusion, we respectfully submit that the Board acting through the Regional Director for the Nineteenth Region properly exercised its discretion in deciding that the appropriateness of a single store unit at Canby, Oregon for meat department employees had not been rebutted. We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARDSON, MURPHY & TEDESCO

By
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Of Attorneys for Intervenor

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No.81-7871
	)	36-CA-3768
and	)	
UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,	)	MEMORANDUM
Intervenor,	)	
v.	)	
ROTH'S IGA FOODLINER, INC.,	)	
Respondent.	)	

Application for Enforcement of an Order of the NLRB Submitted September 22, 1982*

Before: BROWNING, Chief Judge, SNEED and SCHROEDER, Circuit Judges.

The NLRB, joined by intervenor Local 143-A, petitions for enforcement of its bargaining order against Roth's IGA. Roth's, the Union, and the NLRB General

*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(b).

Counsel entered a stipulation providing that if the Board found a single store bargaining unit appropriate for meat department employees at Roth's new store, a bargaining order should be entered. Roth's contends that the single store unit selected by the NLRB is inappropriate and that the new employees should be accreted to the unit of meat department employees existing in its other stores.

Unless clearly arbitrary or capricious, the Board's conclusion--that a bargaining unit is appropriate--will be approved on appeal. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978). The Board has acted within its discretion. The NLRB's factual conclusions in regard to the unit determination are supported, as they should be, by substantial evidence on the record as a whole. 29 U.S.C. § 160(e)(1976); Universal Camera Corp. v. NLRB, 340 U.S. 474,

71 S. Ct. 456 (1951).

The record shows that the meat department employees at the new store had a separate identity from those at Roth's other stores, that Roth's central management did not perform day-to-day supervision at the store, and that the new store was not geographically proximate to Roth's other locations. Further, the bargaining history at Roth's other stores shows that union jurisdictional boundaries precluded the preexisting union from representing the new employees. Based upon these unrebutted facts, Roth's IGA failed to overcome the NLRB presumption that a single store unit is an appropriate unit in the retail sales industry. NLRB v. Lerner Stores Corp., 506 F.2d 706, 707-08 (9th Cir. 1978). See also NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978)(approval of NLRB policy against accretion in order to preserve §7

representation rights of new employees).

The NLRB order is enforced.

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UNITED FOOD & COMMERCIAL WORKERS, LOCAL NO. 143-A,

Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of February, 1983, three copies of the Intervenor's Brief in Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

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